IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO.2618 OF 2004

Brijmohan Kaluram Kanojia .. Petitioner
Versus
State of Maharashtra .. Respondent

Mr.M.V.Yadav i/b. S.V.Marwadi for petitioner
Ms.M.M.Deshmukh, A.P.P. for State.

CORAM : S.C.DHARMADHIKARI, J.
DATE : 18th October 2006.

P.C.

. Rule. By consent rule made returnable forthwith. Heard both sides.

2. Petitioner has invoked this Court's jurisdiction under Article 227 of the Constitution of India read with section 482 of Cr.P.C. challenging the order dated 3rd November 2004 passed by the learned Metropolitan Magistrate, 26th Court, Mumbai in complaint

C.C.No.1046/8/2001 (now numbered at 1020/PW/2005 with M.M. Court, 26th Court, Borivali, Mumbai). At the instance of the petitioner C.R.No.161 of 2001 was registered by Kandivali police station on 1st May 2001. Offence alleged was punishable under section 454, 457 and 380 of I.P.C. The application is against one Sumitra Ramesh Vaishnav described in the complaint as Sumitra B. Kanojia.

3. The matter has a chequered history, inasmuch as, when the police was not investigating the complaint, the petitioner had applied to the learned Magistrate and, thereafter, investigations were ordered and a charge sheet was filed. After the charge sheet was filed, an application came to be filed involving section 173(8) of Cr.P.C. and the request was that the case may be sent for further investigation. Upon this application, after the say of the I.O. was obtained, the learned Trial

Judge passed the following order on 5th January 2002:-

". Heard Learned Advocate for the applicant complainant and I.O. P.S.I. Kadam. The learned Advocate for applicant/complainant drew my attention towards the charge sheet and the investigation made by the I.O. The learned Advocate also drew my attention towards the various correspondence and submitted that in the present case the I.O. has not investigated the case properly. It submitted that I.O. has intentionally not done the investigation properly. After hearing the learned Advocate for complainant and the I.O. I am satisfied that some investigation is yet to be done. It appears that the property which alleged to have been stolen is not recovered. It also appears

that the I.O. has also not recorded the statement of the witnesses cited by the complainant. Moreover, from the submission of the learned Advocate for the complainant, it also appears that the property was not shown to the complainant for identification. Considering all these facts I am inclined to allow the present application hence, the following order.

ORDER

". Application allowed. The Sr.P.I. directed to make further investigation under section 173(8) of Cr.P.C. in the light of the point raised above and file the supplementary charge sheet. The Sr.P.I. is also directed to handover the further

> investigation to some more responsible officer. Returnable on or before 2/3/2002."

4. Thereafter, the order passed by the learned Magistrate was sought to be complied with inasmuch as reports of further investigations were filed. However, an application was made on 5th March 2004 by the petitioner- complainant pointing out that in pursuance of the order dated 5th January 2002, the investigating authority instead of complying with the order in letter and spirit started investigations pertaining to some other grievance of the accused. That is how, a grievance was made that in spite of a specific direction, no progress report or intimation is given to the Metropolitan Magistrate. On one occasion that is on 31st January 2004, the investigating officer apologised to the Court for

not recording the statement of one Nimmy Mehra. However, according to petitioner that was a misleading statement. The petitioner made a grievance that despite clear cut directions and thereafter several attempts by the petitioner, the investigations have not progressed. The petitioner has placed on record his version with regard to the incident at the police chowky. He has specifically pointed out that an attempt is made to rely upon the statement of the accused. In such circumstances, the petitioner made a grievance that necessary and further orders pursuant to the directions issued on 5th January 2002 be passed.

5. This application was taken on record. The prosecution filed its say and according to it, it has investigated the matter and filed necessary report. It prayed that requisite orders be passed.

6. On this application on 3rd November 2004, a cryptic order has been passed by the Magistrate which reads thus:-

> ". Perused the say of A.P.P. The I.O. filed report of 173 of I.P.C. The present application cannot be considered. Hence, application is rejected."

7. Mr.Yadav appearing for petitioner has pointed out to me the order passed by the Magistrate and reproduced above and submits that once a direction was issued to file a report under section 173(8) upon further investigation, then, it was not open for the learned Magistrate to have rejected the application preferred by the petitioner. He submits that there is thus stale mate and nothing has been progressing. He submits that it is well settled that power of police to conduct further investigation is recognised under section 173(8) which

specifically refers to sub-section (2) of section 173. He submits that whenever any such direction is issued and compliance sought, the Court is not obliged to hear the accused. It is essentially a matter between the Court and investigating authority. Once the investigating authority has not complied with the direction and the petitioner brought to the notice of the Court the lapse on the part of investigating authority, then the application of the petitioner making such grievance ought to have been dealt with in accordance with law and in any event, could not have been disposed of by a cryptic one line order.

8. Learned A.P.P. on the other hand relies upon the report which is filed before I.O. and the affidavit filed in this Court. She submits that the petition be dismissed because the trial in the above case is pending. The petitioner has made false allegations about the incident having

occurred. She submits that no such incident took place in the police chowky. She submits that nothing has been revealed in further investigation. Hence, now nothing remains to be done further by the investigating machinery.

9. After the petition is perused by me with the assistance of the learned Advocate for petitioner together with its annexures and the affidavit in reply, in my view, learned Magistrate was in clear error in rejecting the application by the cryptic order. In the light of the further investigation ordered by him on 5th January 2002 and while ordering the same he has assigned cogent and satisfactory reasons, then, what led him to pass the impugned order is not clear at all. Once the petitioner's application cannot be considered is the finding of the learned Magistrate, then, he should have indicated so with some reasons and, thereafter, further indicated as to the fate of the

complaint. It is the grievance of Mr.Yadav that the complaint is not proceeding in the light of this order.

10. In my view, instead of entering into any larger controversy, interest of justice would be sub-served if the application preferred by the petitioner on 5th March 2004 is restored to file of learned Metropolitan Magistrate, 26th Court Borivali for being dealt with afresh on merits and in accordance with law.

11. Learned Magistrate to endeavour and dispose of the said application within a period of four weeks from the date of receipt of this order, without being influenced by the earlier order. All contentions of both sides in that behalf are expressly kept open. Rule is made absolute accordingly. Petition disposed of.

(S.C.Dharmadhikari, J)